

February 26, 1996  
REPORT TO THE HONORABLE  
MAYOR AND CITY COUNCIL

PROPOSED ORDINANCE BARRING CONTRACTS WITH  
PERSONS WHO HAVE VIOLATED CAMPAIGN MONEY  
LAUNDERING LAWS

INTRODUCTION

The Rules Committee previously directed the City Attorney to draft amendments to the San Diego Municipal Code that would bar a company from contracting with the City if that company had reimbursed another person for having made a campaign contribution in a City candidate election, that is, if the company had "laundered" campaign funds. The Rules Committee also asked the City Attorney to answer legal questions associated with a possible related ordinance that would bar a company from obtaining land use permits from the City if that company had "laundered" campaign funds. The full proposal was set forth in a written memorandum from the Mayor.

In response to that referral, the City Attorney has prepared an ordinance requiring debarment of contractors for campaign laundering violations. A copy of the draft ordinance is attached to this report. This report addresses several key policy and legal issues raised by the draft ordinance, as well as those questions raised in the Mayor's memorandum pertaining to contract debarment.

The City Attorney is preparing a separate ordinance and accompanying report pertaining to barring a company from obtaining land use permits from the City if that company has "laundered" campaign funds. That report will also address the Mayor's questions pertaining to barring issuance of land use permits for campaign violations.

BACKGROUND

In April 1994, the Fair Political Practices Commission (FPPC) entered a stipulated enforcement order against The Yarmouth Group, Inc., for several violations of the state's law requiring disclosure of true campaign donors (that is, the campaign money laundering law). In re The Yarmouth Group, Inc., FPPC No. 93/337, p. 477 (April 12, 1994). Specifically, the FPPC found that,  
NO BREAK

Between October 1989 and March 24, 1993, Yarmouth employees made forty-four campaign contributions in the amount of \$250 to various members of the San Diego City Council. The employees made the campaign contributions by issuing personal checks to various city councilmembers to attend fund-raising events, breakfast meetings or luncheons. The employees then claimed the amount of the campaign contribution as a business expense on their monthly expense account reports. Yarmouth reimbursed the employees through the issuance of a company check to the employee paid on the various expense account reports which were submitted.

END NO BREAK

In re Yarmouth, at 484.

These activities were found to be in violation of Government Code sections 84301 and 84300(c), which require disclosure of the true identity of a campaign donor. The FPPC imposed, and Yarmouth paid, a fine of \$92,000 for these and related violations. There was no finding that any San Diego City Councilmembers themselves committed any campaign violations, or were even aware of any of Yarmouth's unlawful campaign money laundering activities.

This FPPC enforcement order came to the City's attention during a time when the City was considering Yarmouth's application for a conditional use permit (CUP) and a planned district ordinance permit (PDO permit) to expand Fashion Valley Center, a major shopping center development that already exists in Mission Valley, a San Diego community. Yarmouth operates the shopping center. Hearings on the CUP and the PDO permit were held by the City's Planning Commission in September, 1994, and by the City Council in November, 1994. The City Council approved the CUP and PDO permit on November 15, 1994. These circumstances led the Rules Committee to ask the City Attorney to draft the ordinance and analyze the legal questions in the Mayor's memorandum.

#### ANALYSIS

For purposes of this report, first, we briefly describe the ordinance; next, we discuss the policy and legal issues raised by the ordinance; last, we address the legal issues raised in the Mayor's memorandum.

#### I. DESCRIPTION OF DRAFT DEBARMENT ORDINANCE

The ordinance is generally patterned after existing federal regulations governing several federal agencies.<sup>F</sup>

These regulations are located in Title 48 of the Code of Federal Regulations, Part 9.4, entitled "Debarment, Suspension, and Ineligibility."

The regulations were

used as a model in part because they offer a cogent, relatively concise scheme for debarment and in part because there is an existing body of

law interpreting them, which will help the City in the event of future legal challenges to this ordinance, if it is adopted. Specific provisions are described briefly below.

Section 22.0801 contains a statement of purpose. Significantly, it declares that the purpose of debarment is not to punish offending contractors, but rather to protect the City. As discussed below, this has legal significance.

Section 22.0802 contains several definitions to be used in the debarment ordinance.

Section 22.0803 in large part simply repeats existing City law pertaining to debarment for public works contractors. This existing law is presently located in Section 22.0514, which is amongst other law governing bidding and award of public works contracts generally. We moved the section to its new number so the whole area could accommodate the Rules Committee's desire to have debarment cover other kinds of contracts, including supplies and consultant service agreements. The new portion of this Code section merely adds one reason, namely, conviction in a court of law or an FPPC enforcement order finding violations of the state's campaign money laundering law, to the existing list of reasons for debarment of public works contractors.

Section 22.0804 provides for debarment of providers of materials, supplies, equipment, insurance or personal (including consultant) services. In contrast with the provision for debarment of public works contractors, and in accordance with the Rules Committee's direction, the sole reason for debarment under this proposed Code section is that the provider has been convicted in a court of law regarding, or made subject to an FPPC enforcement order finding, violations of the state's campaign money laundering law.

Section 22.0805 states the general effect of debarment. Specifically it prohibits any City department from entering a contract with a debarred contractor. It also makes clear that debarment affects all organizational elements of a contractor.

Section 22.0806 requires the City Manager to compile and maintain a current list of all debarred contractors.

Section 22.0807 declares the effect of listing someone on the "debarred contractors" list maintained by the Manager. It provides a procedure for the City to follow to ensure that contracts are not mistakenly awarded to debarred contractors.

Section 22.0808 states that the City Council has discretion whether to continue existing contracts with contractors who are debarred.

Section 22.0809 provides a standard and procedure by which certain high level employees and officers of a debarred company and certain affiliates of the debarred company may be themselves subject to a debarment.

## II. POLICY AND LEGAL ISSUES RAISED BY DEBARMENT ORDINANCE

## A. Policy Issues

### 1. Mandatory vs. discretionary

The ordinance now requires the City to debar contractors if they have been convicted in court or are subject to an FPPC enforcement order for violation of the state's campaign money laundering law. This could be made discretionary.F

The more mandatory a debarment law is, the more punitive it is.

Whether the ordinance should be treated as a punitive measure as opposed to one designed to protect the integrity of the City's contracting is a legal issue and will be discussed below. See "'Banned in Boston---and Birmingham and Boise and . . .': Due Process in the Debarment and Suspension of Government Contractors", John Mantague Steadman, 27 The Hastings Law Journal, 793, 799, n.

22.

### 2. Duration of debarment

The ordinance now requires the debarment to be in place for three years, not two, as the Mayor's proposal suggested. The three year period was chosen for the simple reason that it is consistent with what is currently in place for existing debarment procedures in SDMC section 22.0514, which applies to public works contracts. If the Council prefers a two year period, then the existing ordinance should probably be changed to be consistent.

### 3. Subject of debarment: Companies, individuals or others

The original proposal uses the term "company" to describe the person who has violated the campaign money laundering law and therefore is subject to debarment. However, the term was not defined in the proposal. Rather than containing the term "company", the ordinance contains the word "contractor", and defines the term broadly to include individuals and legal entities. It also defines the word "affiliate" to permit broader debarment of persons intimately involved in the unlawful act leading to debarment.

### 4. Effective date of debarment

The Mayor's proposal states that the "ban" (debarment) "shall start from the date of the determination of the illegal contribution." As drafted, the ordinance requires a court or FPPC finding of violation of the campaign money laundering law, not a finding by the City Council or City staff. That finding forms the factual basis for debarment. Debarment may occur only after a court or the FPPC makes a determination that unlawful campaign activity has occurred.

## B. Legal Issues

### 1. The effect of the purpose of the ordinance on its validity

The more punitive a court finds a law to be, the more procedural protection must be provided to the accused offender before the punitive

action takes place. See *In Re Tucker*, 5 Cal. 3d 171, 179 (1971); see also *Hale v. Morgan*, 22 Cal. 3d 388, 398 (1978). Proposed SDMC section 22.0801 states in essence that the ordinance's purpose is to protect the City's competitive bidding process, and not for the purpose of punishing the contractors. If challenged, the ordinance's stated purpose would not be controlling, however, it will be strong evidence that the intent of the ordinance is not punitive.

## 2. Due process rights

The ordinance has been drafted to allow the City Council to debar a contractor only after a conviction in a court of law or a finding in an FPPC enforcement order that the contractor had violated state campaign money laundering laws. Where a government regulation provides that in the case of a conviction or civil judgment debarment is effectively automatic, because another fact-finder (for example, a judge or jury) has already found one of the bases for debarment beyond a reasonable doubt or by a preponderance of the evidence, there is no constitutional due process requirement of an additional hearing to establish the underlying facts. See *Waterhouse v. U.S.*, 874 F. Supp. 5, 8 (D.D.C. 1994).

The ordinance can be drafted differently to allow the Council itself to make a determination as to whether a contractor had violated state campaign money laundering laws. If that is done, however, the question arises as to whether the contractor is entitled to notice and some form of evidentiary hearing before the Council may find that the contractor has violated state campaign money laundering laws with a consequence of being barred from future City contracts for some period of time. In other words, is the contractor entitled to constitutional "due process" and, if so, what process is due?

The answers to those questions are unclear and would require extensive legal analysis to draw a reasoned conclusion. The City Attorney has drafted the ordinance to allow the Council to rely on other tribunals for the factual determination of whether a company is guilty of a campaign laundering violation and to avoid requiring the Council to hold a full evidentiary hearing on that factual issue. If the ordinance were to be redrafted, the procedural due process issues would have to be more fully researched and the Council could reasonably anticipate having to hold time consuming hearings to make its own factual finding. The Council could also reasonably expect more lawsuits if it were to undertake the responsibility for determining whether someone has committed a campaign laundering violation.

## 3. Preemption by state law

In the recent California case of *Stacy and Witbeck vs. City and County of San Francisco*, 36 Cal. App. 4th 1074 (1995), the court held that a charter city's debarment laws were not preempted by either the California Business and Professions Code or the California Public

Contract Code. The court found that it was within a charter city's purview

to enact a comprehensive program designed to achieve the fiscally sound purposes of competitive bidding. Competitive bidding laws are passed for the benefit and protection of the taxpaying public, not for the benefit and enrichment of bidders. Their purposes, among others, are to guard against favoritism, improvidence, extravagance, fraud and corruption; to prevent the waste of public funds; and to obtain the best economic result for the public.

Id. at 1080.

There is no case deciding whether this type of debarment ordinance based on violations of campaign finance law is preempted by the Political Reform Act ("Act"), which is the Act that contains the state's campaign money "laundering" law. The Act is codified at California Government Code sections 81000-91015. Penalties for violating the Act are set forth in California Government Code sections 91000-91015. In addition to criminal penalties, the Act provides for various forms of civil penalties. Any person who violates portions of the Act for which no specific civil penalty is provided may well be liable in a civil action brought by the FPPC, District Attorney or the City Attorney for an amount up to two thousand dollars (\$2000) per violation. Gov't Code Section 91005.5. Government Code section 91005.5 prohibits filing any civil action against a person if any criminal prosecution is pending.

If, on the one hand, the ordinance is viewed as imposing another form of civil penalty on a violator of the Act, the Act may preclude the City from imposing the penalty. If, on the other hand, the ordinance is viewed as simply a means by which the City enforces its own competitive bidding practices, the ordinance probably would not be preempted under the Act. A staff attorney for the FPPC has offered informally to review the ordinance and to make a determination whether the ordinance adds a penalty to existing penalties for violations of the Act and, if so, whether it is preempted by the Act.

#### RESPONSES TO LEGAL ISSUES RAISED IN MAYOR'S MEMORANDUM

The Mayor's memorandum also asked the City Attorney to address the following questions pertaining to debarment of contractors for violation of campaign money laundering laws:

Question A: What are the legal ramifications of different individuals or agencies (for example, a court of law, an administrative law judge, the FPPC, the City Attorney, the District

Attorney, the Registrar of Voters, or the City Clerk) making the determination that a contribution is illegal?

Response to Question A: If, on the one hand, a court of law, administrative law judge or the FPPC were to make a determination that someone has violated the state's campaign money laundering laws, the City probably would not have to offer further procedural due process rights to that person before debarring them from City contracts for having violated the campaign laundering laws. If, on the other hand, a City officer or employee were to make that determination, the City would probably have to provide an evidentiary hearing of some sort to make that determination. See above discussion on due process rights (at pages 5-6).

Question B: What would be the legal effect of a settlement, with no admission of guilt, between the FPPC and a contractor on the City's ability to debar the contractor?

Response to Question B: The City Attorney believes that the City Council would have to make its own separate finding, based on testimony and evidence presented at a hearing, that the person violated the campaign money laundering laws. The City Council would not be entitled to rely on a settlement agreement, if there is no admission of guilt, to justify a contract debarment on the grounds that someone violated campaign money laundering laws.

The remaining questions in the Mayor's memorandum appear to relate to the proposed ordinance denying issuance of land use permits, not contract debarment, to someone guilty of campaign money laundering violations. That ordinance and the report to the Mayor and City Council on its policy and legal issues are being treated separately. The City Attorney will address the Mayor's questions pertaining to denial of land use permits for campaign laundering violations in that separate report.

Respectfully submitted,

JOHN W. WITT

City Attorney

CCM:jrl:011(043.1)

Attachments

RC-96-7